

Montana

Question: Whether state statutory and regulatory provisions expressly authorize the use of institutional controls, provide provisions to ensure the enforceability of the institutional controls, and operate to cover the use of such institutional controls at NPL sites.

Answer: In Montana, institutional controls are expressly authorized at State CERCLA and Voluntary cleanup sites under the *Comprehensive Environmental Cleanup and Responsibility Act*. This *Act* does not contain specific enforcement provisions. Additionally, NPL sites are not expressly excluded from the provisions of this *Act*.

Statutory/Regulatory Authorization for Institutional Controls

The Montana *Comprehensive Environmental Cleanup and Responsibility Act* authorizes the use of institutional controls through the state's compulsory and voluntary remediation programs.¹ Specifically the *Act* provides that the department "shall select remedial actions, considering present and reasonably anticipated future uses, giving due consideration to institutional controls."² The *Act* defines institutional controls as "a restriction on the use of real property that mitigates the risk posed to public health, safety, and welfare and the environment" and lists "deed restrictions," "easements," "reservations" and "covenants" as examples of available authorized institutional controls.³

¹ MCA 75-10-721.

Degree of cleanup required -- permit exemption -- financial assurance. "(1) A remedial action performed under this part or a voluntary cleanup under 75-10-730 through 75-10-738 must attain a degree of cleanup of the hazardous or deleterious substance and control of a threatened release or further release of that substance that assures protection of public health, safety, and welfare and of the environment.

(2) In approving or carrying out remedial actions performed under this part, the department:

(a) except as provided in subsection (4), shall require cleanup consistent with applicable state or federal environmental requirements, criteria, or limitations;

(b) may consider substantive state or federal environmental requirements, criteria, or limitations that are relevant to the site conditions; and

(c) shall select remedial actions, considering present and reasonably anticipated future uses, giving due consideration to institutional controls, that:

(i) demonstrate acceptable mitigation of exposure to risks to the public health, safety, and welfare and the environment;

(ii) are effective and reliable in the short term and the long term;

(iii) are technically practicable and implementable;

(iv) use treatment technologies or resource recovery technologies if practicable, giving due consideration to engineering controls; and

(v) are cost-effective...."

² Id.

³ 75-10-701. **Definitions ..(11)** "'Institutional control' means a restriction on the use of real property that mitigates the risk posed to public health, safety, and welfare and the environment. Institutional controls include but are not limited to:

(a) deed restrictions;

(b) easements;

(c) reservations;

Statutory/Regulatory Provisions Addressing Institutional Control Enforceability

The Montana *Comprehensive Environmental Cleanup and Responsibility Act* does not contain specific enforcement provisions. However, the *Act* does stipulate that “an institutional control that restricts real property runs with the land and is binding on all successors in interest to real property until the institutional control is removed.”⁴

Applicability of State IC Law at NPL Sites

The *Comprehensive Environmental Cleanup and Responsibility Acts* specifically controls Montana’s State CERCLA program. Parts of the *Act* also extend to the State’s Voluntary Cleanup Program. There are no provisions in the *Act* which expressly exclude NPL sites.

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- (d) covenants, either restrictive or affirmative; and
 - (e) other mechanisms or physical restrictions for controlling present and future land use, including controlled ground water areas, that are placed upon real property to mitigate the risk to public health, safety, and welfare and the environment.”

⁴**MCA 75-10-727.**

Institutional controls. “(1) An owner of real property may, with department approval, restrict the use of the owner’s real property to mitigate the risk posed to the public health, safety, and welfare and the environment by imposing on the real property, without conveying the property or creating a dominant and servient estate, an appropriate institutional control.

(2) An institutional control restricting present and future real property rights is placed on a property by filing a written instrument evidencing the restrictions to be placed on the use of the property with the county clerk in the county in which the property is located.

(3) An institutional control that restricts real property runs with the land and is binding on all successors in interest to real property until the institutional control is removed.

(4) An institutional control must be removed if there is not an unacceptable risk posed to public health, safety, and welfare and the environment. An owner may request department approval to remove all or a portion of the institutional controls from the real property. The department shall review the request and provide the owner with its decision to approve or deny the request within 120 days from the department’s receipt of the request. If the department denies the request, it shall provide the owner with a written explanation of the denial. A department decision to deny the request may be appealed to the board of environmental review and conducted as a contested case proceeding pursuant to Title 2, chapter 4.

(5) If the department or the board approves an owner’s request to remove all or a portion of the institutional controls, the owner shall file the approval with the county clerk in the county in which the real property is located.”